The learned Lord Justice later goes on to say :—

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

Can it be said in this case that the 1st defendant hired his vehicle to the 2nd and 3rd defendants to be used for purposes in which the owner had no interest or concern? Clearly there was a statutory obligation on the 1st defendant, as owner of the car, to insure against accidents to third parties. The 1st defendant knew full well that the car was to be hired, and was, in fact, hired, by the 2nd defendant for the specific purpose of teaching the 3rd defendant how to drive. The 1st defendant therefore entrusted the car to the 2nd defendant, for reward, with the assumption that the 2nd defendant had the requisite knowledge and skill to instruct and supervise the 3rd defendant, as a learner, to drive the car. It seems to me, therefore, that to that extent — namely, the entrustment of the car with the knowledge that it was to be used for a specific purpose, to wit, teaching the 3rd defendant how to drive — the 2nd defendant can properly be regarded as the agent of the 1st defendant and the 1st defendant, as principal, was responsible for the negligent driving of his agent. In my view the owner of a Hire Car who hires his car for reward to another party with the full knowledge that the car is to be used for teaching a third party to drive cannot be heard to say, in the words of Denning L.J. that he has hired the car to a third person for purposes in which he, as owner, "has no interest or concern". For these reasons I am of the opinion that the liability of the 1st defendant for the negligence of the 2nd defendant, as his agent, has been fully established.

It remains only to consider the quantum of damages. It is virtually impossible in cases of this nature to standardise the quantum of damages to be awarded for pain and suffering occasioned by a plaintiff in a case of this nature. I have given the matter the most anxious and careful consideration. On the facts of the case I am of the opinion that a fair and reasonable sum to award is a sum of $2,000 as general damages. I order accordingly.

There will accordingly be judgment for the plaintiff against the three defendants jointly and severally for the sum of $2,000 general damages and $351.70 special damages, together with the costs of this action.

Judgment for the plaintiff.

Solicitors : *Ong Huck Lim & Co.; Pillai, Lim, Lee & Hwang; Huck Aik & Cheng Hock.*

SARDARA ALI v. SARJAN SINGH

[C. A. (Thomson C.J., Hill & Syed Sheh Barakbah JJ.) March 15, 1957]

[K. L. — F.M. Civil Appeal No. 48 of 1956]

Tort — Claim for trespass for removing lorry from plaintiff's premises without his consent — Evidence that plaintiff and defendant had practised a deceit on the public administration of the country in order to get a haulage permit for the vehicle — Plaintiff not relying on illegal transaction to support his claim.

In this case the plaintiff had entered into an agreement with the defendant whereby the lorry, the subject of the proceedings, was to become the property of the plaintiff, although it was to be registered in the name of the defendant, as it was thought that the defendant would be able to obtain a haulage permit for the lorry. Subsequently the defendant removed the lorry from the plaintiff's possession without his permission. The plaintiff claimed damages for trespass. The learned trial Judge found that the lorry belonged to the plaintiff and that the defendant had removed it from his possession but gave judgment for the defendant as the facts showed that the plaintiff and defendant had practised a deceit on the public administration of the country to get a haulage permit for his vehicle. He held that the Court should not assist the plaintiff when he was cheated by his fellow conspirator.

Held: the plaintiff in this case did not seek to found his claim on the illegal transaction and therefore he was entitled to have his right to possession of the lorry enforced against the defendant.

Cases referred to :—

(1) *Simpson v. Nicholls* 3 M. & W. 240, 244.
(2) *Scarfe v. Morgan* 4 M. & W. 270, 281.
(3) *Bowmakers Ltd. v. Barnet Instruments Ltd.* (1945) 1 K.B. 65.
(4) *Pearce v. Brooks* (1886) L.R. 1 Ex. 213.
(5) *Reid v. Fairbanks* (1853) 13 C.B. 692, 727.

COURT OF APPEAL.

C. S. Jayaswal for the appellant-plaintiff.

Dato Sir E. E. C. Thuraisingham for the respondent-defendant.

Thomson C.J. (with whom **Syed Sheh Barakbah J.** agreed) : — In this case the plaintiff sued for a variety of remedies in respect of the taking out of his possession by the defendant of a motor lorry which he, the plaintiff, alleged to be his property.

The plaintiff's case was that in December, 1948, he paid $1,500 to the defendant and that the defendant then purchased six second-hand motor lorries from the Military Disposals Board. It was agreed between the parties that in respect of the payment of $1,500 one of these lorries, the subject of the present proceedings, should become the property of the plaintiffs although it was to be registered in the name of the defendant. The reason for this was that it was thought that the defendant would be able to obtain a haulage permit in

respect of the lorry, which he in fact did, while the plaintiff would be unable to do so.

In 1950 the plaintiff and one Nihal Singh paid a further sum of $3,500 to the defendant as a result of which the defendant executed a document which purported to transfer the lorry and the benefit of the haulage permit in respect of it to Nihal Singh and the plaintiff, and on 3rd July, 1953, Nihal Singh transferred his half share in the lorry to the plaintiff.

At some time the lorry passed into the possession of the plaintiff and he proceeded to operate it, probably under the haulage permit issued to the defendant. The date on which the plaintiff thus obtained possession of the lorry is by no means clear from the evidence, and unfortunately the learned trial Judge neither considered nor decided the point. It is, however, clear, and indeed on this point there is no dispute on the evidence, that it was some considerable time prior to January, 1955. In January, 1955, the defendant removed the lorry from the plaintiff's possession without his consent and is still in possession of it.

The defendant's case was that the lorry had always belonged to him, that the plaintiff had never been more than the driver of it and that the document which purported to be executed in 1950 was a forgery.

The learned trial Judge found as a fact that the document executed in 1950 was not a forgery and in effect accepted the plaintiff's story as substantially true. He thought, however, (although this was not pleaded or in any way set up by the defendant) that he was bound to hold that the plaintiff's claim was defeated by what he has described as "moral estoppel" and gave judgment for the defendant, but without costs.

For myself I am not at all sure that I know what "moral estoppel" is. It is not a term which is very commonly used in our legal literature, and I really do not think any useful purpose would be served by embarking at any length on an examination of what exact significance is to be attached to it, for in the present case the learned trial Judge has treated it as a convenient shorthand way of referring to the general principle that a party is not to be allowed "either in support of his claim, or in answer to that of his opponent, to set up his own fraud, illegality, or wrong". (*Spencer Bower* on Estoppel by Representation, p. 383).

In the course of his long and careful judgment the learned trial Judge said :—

> "The plaintiff to prove his case has to prove that he and the defendant practised a deceit on the public administration of this country in order to get a haulage permit for his vehicle. The question is does his conduct raise a 'moral estoppel' which will prevent him succeeding in the Courts of this country. He asks the Courts to assist him when he is cheated by his fellow conspirator."

At a later stage he said :—

> "It is the duty of the court when it realises that a litigant is setting up his own fraud to refuse him aid. The principle is '*Ex turpi causa non oritur actio*' . . . . . The plaintiff on his own shewing was party to a deceit whereby the Registrar of Motor Vehicles issued a haulage permit for lorry M 2207 which he would not have done if he had not been deceived."

On these grounds he considered himself obliged to find for the defendant.

With great respect I am unable to agree either with the learned trial Judge's course of reasoning or with his views as to the extent of the principle of law which he applied to the results to which that course of reasoning led him.

For the purposes of the present argument it may be accepted that the plaintiff and the defendant practised a deceit on the public administration of this country in order to get a haulage permit for the vehicle. I am unable to agree, however, that the plaintiff had to prove this in order to prove his case in the present proceedings. The action was not in contract. It was an action for trespass to goods. In order to succeed in it the plaintiff had to prove that he was in possession of the lorry and that the defendant seized and took it away. The defence was that it was not the plaintiff's lorry. The plaintiff's reply to that was that it was his lorry. There was no need for him to go into the question of how the lorry came to be registered in the name of the defendant except by way of anticipating any argument that might be set up on behalf of the defendant based on that registration. The lorry became his as a result of one or possibly two agreements with the defendant which may well have been bad as being contrary to public policy, but the consideration that these agreements were bad did not prevent the property in the lorry passing to him (see *Simpson v. Nicholls*[1] and *Scarfe v. Morgan*[2]). The property having passed and the plaintiff having obtained possession I fail to see why the plaintiff should not have his possession protected and his property or its value restored to him. As was said by Parke B. in *Scarfe v. Morgan*[2], *supra* :—

> ". . . . . this is not the case of an executory contract; both parties were in *pari delicto* — it is one which has been executed, and the consideration given; and although in the former case the law would not assist one to recover against the other, yet if the contract is executed, and a property either special or general has passed thereby, the property must remain;"

I am fortified in these conclusions by a consideration of the case of *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*[3], the headnote to which reads :—

> "No claim founded on an illegal contract will be enforced by the court, but as a general rule a man's right to possession of his own chattels will be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between

himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim. An exception to this general rule arises in cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all."

In that case the plaintiffs had acquired certain machine tools and let them out to the defendants on hire-purchase in circumstances which involved serious contraventions of certain defence Regulations and which indeed amounted, it was said, to nothing less than a criminal conspiracy. The defendants converted the tools and it was held that the plaintiffs were entitled to damages. In delivering the judgment of the Court of Appeal Du Parcq L.J. said (at page 70): —

"*Prima facie*, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would, indeed, be astonishing if (to take one instance) a person in the position of the defendant in Pearce v. Brooks[4], supposing that she had converted the plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is, in truth, followed by the courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words 'illegal contract' must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words 'founded on an illegal contract'. The form of the pleadings is by no means conclusive. .....

In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim."

It is true that that was a case of conversion. But for myself I can see nothing in His Lordship's statement of the law which is not applicable with equal force to a case of trespass.

For these reasons I am regretfully forced to say that I would allow the appeal and set aside the judgment entered in favour of the defendant.

There only remains the question of the remedy to which the plaintiff is entitled. He is clearly not entitled to be compensated for any loss of profits which have resulted from the defendant's action for clearly the only profits which he was deriving from the lorry were the profits arising from its unlawful use and in any event the capacity for profitable use is part of the value of a chattel and therefore the loss of such use is not a separate head of damages (see *Reid v. Fairbanks*[5]). In the circumstances I think the ends of justice will be served if he has judgment for the value of the lorry at the time of the trespass, that is to say, in January 1955, that value to be ascertained by the Registrar on inquiry, with interest at the rate of 6% per annum.

I see no reason why costs should not follow the event both in the Court below and here and would order accordingly. I would also order payment out of the deposit in Court to the plaintiff against his taxed costs.

Hill J. : — The appellant was the plaintiff in the lower Court. His claim against the respondent was for trespass to his goods, namely a lorry, which he had purchased from the respondent and which he alleged the respondent had taken out of his possession on 27th January 1955 without his knowledge or permission. The claim prayed for the return of the lorry or its value and also for damages.

The defence was a total denial of the plaintiff's claim. It denied that plaintiff was the owner of the vehicle, clearly alleged fraud and forgery by the plaintiff and maintained that the lorry was the property of the defendant who employed the plaintiff as his driver.

On the evidence the learned trial Judge found wholly in favour of the plaintiff. So much so, indeed, that he ordered papers should be sent to the Public Prosecutor for consideration whether the defendant should be prosecuted for giving false evidence.

In spite of this the learned trial Judge found himself obliged to find for the defendant for the following reasons. I quote from his written judgment.

"There is an important aspect of the plaintiff's case which I considered and mentioned during the course of the trial. It concerns 'moral estoppel'. The plaintiff to prove his case has to prove that he and the defendant practised a deceit on the public administration of this country in order to get a haulage permit for his vehicle. The question is does his conduct raise a 'moral estoppel' which will prevent him succeeding in the Courts of this country. He asks the Courts to assist him when he is cheated by his fellow conspirator.

"The question is whether the Court, of its own motion, should refuse to grant the plaintiff his remedy because he seeks the Court's assistance to enforce his claim in a transaction which is contrary to public policy. The authorities are set out in Spencer Bower on Estoppel by Representation 1st Edition paragraph 426 at page 383. In my opinion it is not necessary that moral estoppel should be pleaded: it is the duty of the Court when it realises that a litigant is setting up his own fraud to refuse him aid. The principle is '*Ex turpi causa non oritur actio.*' The arguments advanced by Mr. Jayaswal from English road transport law did not appear to me to be applicable. What was done may not have been illegal in England. The plaintiff on his own shewing was party to a deceit whereby the Registrar of Motor Vehicles issued a haulage permit for lorry M 2207 which he would not have done if he had not been deceived.

"For these reasons I consider myself obliged to find for the defendant. I make no order as to costs since I consider that the estoppel could have been raised on the pleadings."

Now it seems to me that, in order to succeed in his claim, all that the plaintiff had to prove was that he was in entitled possession of the lorry and that the defendant had taken it away. He did not strictly have to prove ownership, though he did so, and I hold this view because, as I stated above, the plaintiff's claim was essentially and basically an action for trespass to his goods.

If this view is correct, it follows that the plaintiff was under no obligation whatever, in order to prove his case, to prove in addition that he and the defendant practised a deceit on the public administration of this country with regard to a haulage permit. It is in this connection that I feel, with great respect, that the learned trial Judge was mistaken. Indeed, the pleadings shew that the plaintiff was forced to refer to the haulage permit issue by the defence set up.

The judiciary has adopted for its own guidance, and in the public interest, a rule of conduct that any party litigant shall not be allowed, either in support of his claim, or in answer to that of his opponent, to set up his own fraud, illegality or wrong. *Winfield* (3rd edition page 28) suggests an acceptable rule namely that a plaintiff can sue for, and recover, damages in tort, unless allowing him to do so would be against public policy in general, or would be the condonation of a breach of public morals or public safety in particular.

In the present case I do not consider that the plaintiff was setting up against the defendant any fraud, illegality or wrong. Nor can I see that the straightforward transaction of sale between the parties was against public policy or a breach of public morals or safety. In the circumstances I am of opinion that to invoke 'moral estoppel' against the appellant was not justified.

In this connection I must refer to the case of *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*[3]. That case was one of conversion and the parties had committed a breach of certain Defence Regulations. I quote from the judgment of the Court of appeal delivered by Du Parcq L.J. :—

> "*Prima facie*, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interest and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority.
>
> In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim or right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim."

I can see no reason why the terms of this judgment should not be equally applicable to a case of trespass to goods.

I would therefore allow this appeal enter judgment for the appellant, giving him the declaration he sought and ordering the respondent to return lorry No. M. 2207 or to pay in the alternative its value at the time of seizure. That value to be ascertained by the Registrar, with interest at the rate of 6% per annum. In addition, I consider that the appellant should have the costs of this appeal and the taxed costs of the proceedings in the lower Court and that the deposit should also be paid out to him against his taxed costs.

Appeal allowed.

LEE LEONG SIM v. REG.

[A. Cr. J. (Rigby J.) March 15, 1957]

[Penang — Criminal Appeal No. 39 of 1956]

Common Gaming Houses Ordinance, 1953 — Pin-tables — Whether articles are used in or for the purpose of gaming.

In this case the appellant appealed against his conviction on a charge of assisting in the management of a common gaming house, to wit, by operating lotto pin-tables. The prosecution case was that on a visit to a certain premises in Queen Street in pursuance of a search warrant, the police found a number of pin-tables on the premises at which various persons were playing. The appellant was in charge of the machines. The Police Inspector who visited the premises watched one of the players playing at a pin-table. The pin-table was marked "Try Your Skill. Gambling Strictly Prohibited. For Amusement Only." Two of the persons, who were playing at the pin-tables were called as prosecution witnesses and they both said they were playing for amusement only.

Held: (1) there was no evidence before the learned Magistrate that the pin-tables were articles used in or for the purpose of gaming;

(2) even if the pin-tables had been shown to be instruments of gaming within the meaning of the Ordinance and for that reason the presumption had arisen that the premises were a common gaming house and that they were so kept or used by the occupier, that presumption was rebutted by the evidence of the prosecution itself.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Cheng Poh for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Rigby J. : — The appellant was convicted before the learned Magistrate of an offence contrary to section 4 of the Common Gaming Houses Ordinance, 1953. Upon conviction, he was fined the sum of $300 or two months' imprisonment in default of payment.

The particulars of the charge were that he, on the 28th day of September, 1956, at about 3.50 p.m. did assist in the management of a place used as a common